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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 938

TOM MORGANO,

Petitioner,

vs.

ALVA PILLIOD, District Director of Immigration and Naturalization Service, Chicago, Illinois,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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No.

TOM MORGANO, *Petitioner.*

vs.

ALVA PILLIOD, District Director of Immigration and Naturalization Service, Chicago, Illinois, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Tom Morgano, prays that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Seventh Circuit entered in the above entitled cause on February 5, 1962.

JUDGMENT AND OPINION OF THE COURTS BELOW.

The Judgment Order of the United States District Court for the Northern District of Illinois, Eastern Division, granting respondent's motion for summary judgment and dismissing petitioner's complaint, dated February 23, 1961, is not reported, but is set forth in the printed Appendix hereto, and in the certified record transmitted herewith.

The opinion of the United States Court of Appeals for the Seventh Circuit, affirming the judgment of the United States District Court for the Northern District of Illinois, dated February 5, 1962, is not reported but is set forth in the Appendix hereto and in the certified record transmitted herewith. The order of the United States Court of Appeals denying the Petition for Rehearing, dated March 7, 1962, is not reported but is set forth in the Appendix hereto and in the certified record transmitted herewith.

JURISDICTION.

The order of the United States Court of Appeals for the Seventh Circuit denying the Petition for Rehearing on the appeal taken thereto was entered on March 7, 1962. This petition is filed ninety days thereafter. Jurisdiction is conferred on this Court by 28 U.S.C. 1254(1).

QUESTIONS PRESENTED.

1. When the object of the conspiracies, charged by the indictments on which convictions were had, was merely "to violate Internal Revenue laws of the United States", and only one of the eight stated means of effectuating that object envisions fraud, must not the inference most favorable to the alien sought to be deported be drawn and the test of least culpability necessary to sustain conviction be employed in determining whether the convictions were from crimes involving moral turpitude?

2. The issue raised in this cause was whether the convictions on indictments for conspiracy "to violate the Internal Revenue laws" by eight stated means could, under the law, be interpreted as its most aggravated possible degree of culpability, that is, "a conspiracy to defraud the United States of taxes." The sole question raised and decided in *Jordan* v. *De George*, 341 U. S. 223,

was "whether conspiracy to defraud the United States of taxes on distilled spirits is a 'crime involving moral turpitude' . . ." Has not the United States Court of Appeals for the Seventh Circuit misapplied the rule of *stare decisis* in finding that decision "controlling" on the above described issue raised in this cause?

3. Can a person ordered to show cause why he should not be deported on a charge not constituting grounds for deportation—and then, be ordered deported on findings not set forth in the charge?

STATUTES INVOLVED.

Section 2803 (a), Internal Revenue Code of 1939.

"No person shall transport, possess, buy, sell, or transfer any distilled spirits, unless the immediate container thereof has affixed thereto a stamp denoting the quantity of distilled spirits contained therein and evidencing payment of all internal-revenue taxes imposed on such spirits."

Section 2833 (a), Internal Revenue Code of 1939.

"Any person who shall carry on the business of a distiller without having given bond as required by law, shall, for every such offense, be fined not less than $100 nor more than $5,000 and imprisoned for not less than thirty days nor more than two years.

Section 2834, Internal Revenue Code of 1939.

"No mash, wort, or wash, fit for distillation or for the production of spirits of alcohol, shall be made or fermented in any building or on any premises other than a distillery duly authorizing according to law. Every person who violates any provision of this section shall be fined for each offense not less than $500 nor more than $5,000 and be imprisoned not less than six months nor more than two years."

Section 2913, Internal Revenue Code of 1939.

"Whenever any person removes, or aids or abets in the removal of, any distilled spirits on which the tax has not been paid, to a place other than the internal revenue bonded warehouse provided by law, or conceals or aids in the concealment of any spirits so removed, or removes, or aids or abets in the removal of, any distilled spirits from any such warehouse authorized by law, in any manner other than is provided by law, or conceals or aids in the concealment of any spirits so removed, he shall be fined not less than $200 nor more than $5,000 and imprisoned not less than three months nor more than three years."

Section 3253, Internal Revenue Code of 1939.

"Any person who shall carry on the business of a brewer, rectifier, wholesale liquor dealer, retail liquor dealer, wholesale dealer in malt liquors, retail dealer in mail liquors, or manufacturer of stills, and willfully fails to pay the special tax as required by law, shall, for every such offense, be fined not less than $100 nor more than $5,000 and be imprisoned for not less than thirty days nor more than two years."

Title 18, U. S. C. Section 88.

"If two or more persons conspire to commit any offense against the United States or to defraud the United States in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy . . ."

STATEMENT OF THE CASE.

This action concerns a sixty-two year old man, born in Italy, who entered this country for permanent residence in 1922, forty years ago.

He was served with an Order to Show Cause why he should not be deported and Notice of Hearing thereon on June 5, 1959, said Order being dated the previous day, June 4, 1959.

On July 6, 1959, the petitioner appeared at the time and place set for hearing on the Order to Show Cause. The charges of the said order were that he was an alien twice convicted of the offense of "violation of conspiracy to violate Internal Revenue Act, Section 88, Title 18, United States Code". (Ex. Vol. 95).

In the first of the two convictions, one Sam De George, who has been before this Court in *Jordan* v. *De George*, 341 U.S. 223, was a named defendant. Such conviction was one of the bases for Mr. De George's deportation.

After the petitioner was sworn, gave his name and address a motion was made to terminate the proceeding on the ground that the Order to Show Cause was insufficient, such motion being directed particularly to paragraphs 4 and 5, and to the stated provision of law alleged to warrant deportation. The motion was denied and the cause proceeded. (A. 21-25)

In the course of hearing on that day, the Examining Officer amended the Order to Show Cause by striking paragraph 5 and substituting paragraph 6 therefor, (A. 69-70), which amendment did not substantially change the charge.

The Order to Show Cause as amended read:

> "4. 'You were convicted in the United States District Court at Hammond, Indiana on December 29, 1938, for the offense of conspiracy to violate Internal Revenue Act, Section 88, Title 18, United States Code;" (Exhibit 1).
>
> "6. You were convicted in the United States District Court of South Bend, Indiana on June 10, 1941 for the offense of violation of Internal Revenue Code, Section 88, Title 18, United States Code, 'Internal Revenue Conspiracy';" (Ex. Vol. 95)

The motion to terminate on the ground that the Order to Show Cause was insufficient in law was allowed to stand as to the amendment, and was denied.

The hearing continued intermittently through July 15, 1959. On August 10, 1959, the Special Inquiry Officer published his opinion; findings of fact and conclusion of law, on the basis of which he ordered the petitioner's deportation. Such findings of fact, conclusion of law and order are in part as follows:

> "3. That the respondent was convicted in the United States District Court at Hammond, Indiana, on December 29, 1938, for the offense of violation of Title 18, U. S. Code, Section 88, conspiracy to violate the Internal Revenue Laws by defrauding the United States of taxes on distilled spirits;
>
> "4. That on June 10, 1941, the respondent was convicted in the United States District Court at South Bend, Indiana, for the offense of violation of Title 18, U. S. Code, Section 88, conspiracy to violate the Internal Revenue Laws by defrauding the United States of taxes on distilled spirits.

"Conclusion of Law: Upon the basis of the foregoing findings of fact, it is concluded:

> "1. That under Section 241 (a) (4) of the Immigration and Nationality Act, the respondent is subject to deportation on the ground that at any time after entry he has been convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct, to wit: conspiracy to violate the Internal Revenue Laws, Section 88, Title 18, U. S. Code (two offenses).

"Order: It is Ordered that the respondent be deported from the United States in the manner provided by law on the charge contained in the Order to Show Cause." (A. 127-8).

It is from the said opinion, findings of fact, conclusions of law and order that petitioner appealed to the Board of Immigration Appeals. Hearing was had before said Board on September 17, 1959, and on February 6, 1960, the Board handed down its decision dismissing the appeal. (A. 129-149)

This suit was instituted in the United States District Court for the Northern District of Illinois on June 24, 1960 (A. 2) alleging the order of deportation was invalid and void (A. 8-13). On July 14, 1960, the respondent filed his Answer (App. 2), denying each of the bases upon which the petitioner had alleged the illegality and voidness of the deportation order (A. 15). Two months thereafter, on September 14, 1960, respondent filed a motion for summary judgment (A. 150) and filed with the clerk of the District Court what purported to be a certified and true record of the proceedings before the Immigration and Naturalization Service (Exhibit A, Exhibit Volume). (A. 2-3). On February 23, 1961, judgment was entered granting the motion and dismissing this petitioner's petition. (A. 153-4). Notice of appeal to the United States Court of Appeals for the Seventh Circuit was filed on April 1, 1961. (A. 154).

The errors *inter alia*, asserted as grounds for reversal and the decision of the Court of Appeals thereon, are as follows:

1. The order to show cause is insufficient to charge grounds for deportation. This ground was not discussed in the opinion. (Appendix 2a-6a)

2. Determining petitioner deportable on findings not included in the charges of the order to show cause is proscribed. This ground was not discussed in the opinion. (Appendix 2a-6a)

3. The convictions on which deportation was ordered do not constitute convictions for crimes involving moral turpitude. The Court of Appeals found *Jordan* v. *De George*, 341 U. S. 223, "controlling" on this issue. (Appendix 6a)

4. The convictions on which deportation was ordered were not interpreted according to law. This ground was not discussed other than to hold *Jordan* v. *De George*, 341 U.S. 223, "controlling." (Appendix 6a)

The Court of Appeals affirmed the judgment of the District Court on February 5, 1962. Petition for Rehearing was denied on March 7, 1962. (Appendix 6a-7a)

REASONS FOR GRANTING THE WRIT.

I.

The effect of the decision of the United States Court of Appeals for the Seventh Circuit herein is an interpretation of the convictions at the most aggravated degree of culpability under the charges upon which conviction was had. That interpretation is contrary to the accepted test of the least culpability necessary to sustain conviction, and constitutes a conflict with the decisions of the Second Circuit, and of the rules on construction of this Court requiring resolutions of doubt in favor of the alien.

The Indictments in Exhibits 11 and 12 (Ex. Vol. 114-129) are substantially the same. They charge that one Thomas or Tommy or Tom Morgano conspired with certain named co-defendants to violate the Internal Revenue laws of the United States. The allegations of the ends of the conspiracies are plainly not sufficient to support a finding of moral turpitude. It needs no citation of authority to conclude that all violations of Internal Revenue Laws are not crimes involving moral turpitude, nor do they necessarily involve fraudulent conduct. It has been consistently held that the determination of whether the crime of conspiracy involves moral turpitude must be made on the basis of whether the substantive crime, which the defendant conspired to commit, is or is not of that nature. It is our submission that violation of Internal Revenue Laws does not necessarily involve moral turpitude.

Under the most strict authority, fraud has been the test to determine whether crimes not of the gravest character involve moral turpitude. *Berlandi* v. *Reimer*, 2 Cir., 1940, 113 F. 2d 429. The intent to defraud must be alleged as

the object of a crime such as here charged in order to import moral turpitude. If the intent to defraud was not alleged, then it was unnecessary to proof, and not necessary to conviction. The fraud aspect, under such authority, is the element which injects moral turpitude into Internal Revenue violations. Without fraud, no turpitude.

It is basic that the means alleged cannot be used to supplement the charge of the conspiracy and its stated object. It is elemental that the conspiracy and its object (to violate the Internal Revenue laws) are single and indivisible, while the means to be employed in carrying out the conspiracy effecting the object are multiple and divisible. The government is obliged to prove the conspiracy as laid in the indictment, but it is not required to prove in detail all of the allegations in the indictment relating solely to the means to be employed in carrying out the conspiracy. *Langley* v. *United States*, 6 Cir., 8 F. 2d 815, 819. It was, thus, unnecessary to the object of the conspiracy "to violate the Internal Revenue laws" that each and every of the means described had to be shown to prove the conspiracy as alleged.

A single offense which is capable of being committed by as many means not repugnant to each other as the pleader chooses, may be established by proof of its commission by *any one* of them. *Christiensen* v. *United States*, 5 Cir., 52 F. 2d 950, 951. With those basic rules in mind, we invite the Court's attention to the several means by which the end of the conspiracies charged in Exhibits 11 and 12 (the basis for the order of deportation) were to be attained. It is alleged that the conspirators would:[1]

---

[1] The applicable statutory provisions are set forth under the several means by the author hereof for convenient reference. They constitute no part of the charges of the Indictments (Exhibits 11 and 12)

1. defraud the United States of tax on distilled spirits:
   "If 2 or more persons conspire . . . to defraud the United States . . . in any manner or for any purpose . . ." (T. 18 U. S. C. §88)

2. carry on the business of a retail and wholesale liquor dealer in distilled spirits without having paid the special tax as required by law.

   Section 3253 Internal Revenue Code of 1939 is similar to this means but requires a wilful failure to pay.

3. Remove and aid in the removal of distilled spirits on which the United States Internal Revenue Tax had not been paid, to a place other than a distillery warehouse or other bonded warehouse provided by law.
   "Whenever any person removed, or aids in the removal of, any distilled spirits on which the tax has not been paid, to other than the internal revenue bonded warehouse provided by law . . ." Section 2913 Internal Revenue Code 1939.

4. Conceal or aid in the concealment of said spirits so removed;-
   "Whenever any person . . . conceals or aids in the concealment of any spirits so removed . . ." Section 2913 Internal Revenue Code of 1939.

5. possess certain distilled spirits . . . the immediate containers of which distilled spirits did not then and there have affixed thereto stamps denoting the quality of distilled spirits contained therein and evidencing payment of all Internal Revenue Taxes imposed on said spirits as required by law;

   "No person shall . . . possess . . . any distilled spirits, unless the immediate container thereof has

affixed thereto a stamp denoting the quantity of distilled spirits and evidencing payment of all Internal Revenue Taxes imposed on such spirits." Section 2803 Internal Revenue Code 1939

6. carry on the business of a distiller without having given bond as required by law;
"*Any person who shall carry on the business of a distiller without having given bond as required by law . . .*" Section 2833 Internal Revenue Code of 1939.

7. make mash fit for distillation or for production of spirits on premises other than a distillery duly authorized according to law;
"*No mash . . . fit for distillation or for the production of spirits . . . shall be made . . . on any premises other than a distillery duly authorized by law . . .*" Section 2834 Internal Revenue Code of 1939.

8. possess a still set up which still was not then and there registered as required by law. (This means is found only in the indictment in Exhibit 12, no such allegation appears in the Indictment in Exhibit 11).
"*Every person having in his possession . . . any still . . . set up, shall register the same with the collector of the district in which it is . . .*" Section 2810 Internal Revenue Code of 1939.

It is noted that of the above stated means of accomplishing the object of the scheme, only that numbered 1 above envisions fraud, the other seven such means do not ever require wilfulness, being entirely regulatory and prohibitory and without the requirement of felonious intent, much less the more restricted intent to defraud. Examina-

tion of the statutory prohibitions fails to disclose explicit language demonstrating that the Congress intended to go beyond inhibiting the acts enumerated. Familiar statutory phraseology concerning fraud is conspicuous by its absence. *Giglio* v. *Neelley*, 7 Cir., 208 F. 2d 337, 340.

Thus, the court, must, in considering whether the crimes on which conviction was had involve moral turpitude, must apply the test of the lease culpability necessary to sustain conviction. *United States* v. *Zimmerman*, E. D. Pa. 71 F. Supp. 534, 536, 537. Illustratively, we submit that a charge of conspiracy "to violate the Internal Revenue Laws of the United States by the commission of various offenses . . . which said offenses were that the said defendants would . . . possess a still set up which still was not then and there registered as required by law" or that said defendants would "possess and transport distilled spirits . . . the immediate containers of which distilled spirits did not then and there have affixed thereto stamps denoting the quantity . . . and evidencing payment of all Internal Revenue Taxes . . ." (Exhibits 11 and 12) does not necessarily include the defrauding of the United States of taxes on distilled spirits.

It is, thus, observed that the indictment is satisfied by a conspiracy to violate the Internal Revenue laws by means morally innocent. Being neither "necessarily", nor "inherently" immoral, the convictions herein did not satisfy the demands of Section 241 (a)(4) of the Immigration and Nationality Act of 1952.

In translating the convictions concerned herein as conspiracies to "unlawfully, knowingly and wilfully defraud the United States of tax on distilled spirits" (Ap. 13407, Appendix p. 6a), the Seventh Circuit has applied a test of the gravest fault consonant with conviction.

Such interpretation is in direct conflict with the Second Circuit which employs the test of least culpability necessary to sustain conviction. See *U.S. ex rel. Guarino* v. *Uhl*, 107 F. 2d 399 and cases cited therein at p. 400, and *United States ex rel. Zaffarino* v. *Corsi*, 2 Cir., 63 F. 2d 757.

Such interpretation is equally in conflict with the rules of construction of this Court requiring resolution of doubts in favor of the alien. *Delgadillo* v. *Carmichael*, 332 U. S. 388; *Fong Haw Tan* v. *Phelan*, 333 U.S. 6.

II.

This Court's decision in Jordan v. De George, 341 U.S. 223, expressly entertained and resolved the single question of "whether conspiracy to defraud the United States of taxes on distilled spirits is 'a crime involving moral turpitude' . . . " The United States Court of Appeals for the Seventh Circuit found certain expressions in that case "controlling" on the issue of whether the convictions upon which petitioner's deportation has been ordered must import convictions for conspiracy to defraud the United States of taxes. That finding is in conflict with the decisions of this Court applicable to the rule of stare decisis; and in conflict with its own decisions, applicable to the rule.

This Court in *Jordan* v. *De George*, 341 U.S. 223, stated: "This case presents only one question: whether conspiracy to defraud the United States of taxes on distilled spirits is a 'crime involving moral turpitude' . . . " (pp. 223-4). In a 6-3 decision, it answered that question in the affirmative.

The *De George* case was tried and appealed on the very restricted basis, recognized by this Court in framing the question above. The restricted basis is illustrated by the briefs and arguments filed in the cause.

"Congress (did or) did not intend that the statute under which the Deportation Proceedings are being Executed should embrace the crime of tax evasion or conspiracy to evade taxes." See arguments of counsel, Cause No. 10016, 7 Cir., 1950 and Cause No. 348, S. C. 1951.

The expressions of this Court in *Jordan* v. *De George*, 341 U.S. 223, relative to *De George* having "on two occasions been convicted of the same crime" undoubtedly arose from the agreement of counsel.

On certiorari, the brief of *De George* made an admission that he had been convicted twice of violating Section 3321 of Title 26; and, the brief of the Government made the uncontested statement that "the Indictment charged . . . that the defendants did conspire to 'unlawfully, knowingly and wilfully defraud the United States of tax on distilled spirits." See Briefs of Counsel, Cause No. 348, 1951.

This Court, in its decision did not, in its expressions, confine itself to the single question presented and recognized by it. Apparently, relying upon the concessions of *De George* and the agreement thereto by government counsel, the court stated:

> "In 1937, respondent was indicted under 18 U.S.C. § 88 for conspiring with seven other defendants to violate twelve sections of the Internal Revenue Code. The indictment specifically charged him with possessing whiskey and alcohol 'with intent to sell it in fraud of law and evade the tax thereon.' He was further accused of removing and concealing liquor 'with intent to defraud the United States of the tax thereon.' . . .
>
> "Less than a year later, he returned to his former activities and in December 1939, he was indicted again with eight other defendants for violating the same

federal statutes. He was charged with conspiring to 'unlawfully, knowingly, and wilfully defraud the United States of tax on distilled spirits' . . ." *Jordan v. De George*, 341 U.S. 223, 223-4.

And, again, it stated:

> "respondent has on two separate occasions been convicted of the same crime, conspiracy to defraud the United States of taxes on distilled spirits. Therefore, our inquiry in this case is narrowed to determining whether this particular offense involves moral turpitude." (p. 226).

The factual inaccuracy of the statement that De George was indicted in 1939 for the violation of the same statute as those for which he was indicted in 1937 (341 U.S. 223, 224) is best illustrated by reference to the record of the *De George* case. The 1937 indictment charged in pertinent part:

> "That . . . Sam De George . . . *Did conspire*, combine, confederate and agree together, each with the other, and with divers others persons to these Grand Jurors unknown, *to commit divers offenses against the Internal Revenue Laws of the United States, to-wit: to violate Sections* 1152(a), 1155(f), 1162, 1163, 1164, 1165, 1170, 1182, 1187, 1397(a), 1440, *and* 1441 *of Title* 26, *United States Code Annotated*, that is to say, the said defendants and co-conspirators, did conspire, combine, confederate and agree together, each with the other and with divers other persons to these Grand Jurors unknown; to possess and transport spirituous liquors, to-wit, whiskey and alcohol, with having affixed to the containers of said spirituous liquors the Internal Revenue stamps denoting the quantity thereof and payment of the taxes thereon:" etc. through the description of the 12 identified statutes. (emphasis supplied).

The 1939 indictment (Exhibit 12) charged in pertinent part:

> "that . . . Sam De George . . . Thomas Morgano . . . *did . . . conspire*, combine, confederate, arrange and agree together and with divers other persons, whose names are to the Grand Jurors unknown *to violate the Internal Revenue Laws of the United States* by the commission of various offenses against the United States of America and the laws thereof, which said offenses were that said defendants and said persons unknown, would then and there and thereafter . . . unlawfully, knowingly, and wilfully defraud the United States of tax on distilled spirits, carry on," etc. as set forth hereinbefore. (emphasis supplied)

That the two indictments did not charge the same offenses, is eminently apparent when considered in juxtaposition. It is also eminently apparent that this Court proceeded on a mistake of fact, on a matter not in issue, and that the mistake of fact was engendered by the agreement of the parties.

It is on the ground of the 1939 conviction, in which De George was a defendant, and a conviction on a similar indictment in 1941, that this petitioner has been ordered deported. It is his position that the convictions on such indictments do not necessarily import "conspiracy to defraud the United States of taxes on distilled spirits" (this position is explained more fully hereinbefore). In ruling on the issue presented to it, the Court of Appeals for the Seventh Circuit relying from the portions of the decision set forth above held:

> "We think the *De George* case is not only pertinent but controlling." (Appendix p. 6a)

It is, and has been, this petitioner's submission that he is not bound by any agreements made in the *De George* case to which he was not party.

It is his further submission that the United States Court of Appeals for the Seventh Circuit, finding the expressions of this Court on a matter not in issue, "controlling" as to the disposition of that issue affirmatively presented and argued for the first time in this case is in conflict with the decisions of this Court applicable to the rule of *stare decisis*.

It is a settled rule "that general expressions in an opinion which are not essential to dispose of a case, are not permitted to control the judgment in subsequent suits." *Harrison* v. *Northern Securities Co.*, 197 U.S. 244, 291; *United States ex rel. Johnston* v. *County of Clark*, 96 U.S. 211, 218; *Carroll* v. *Lessee of Carroll*, 16 How. 275, 287; *Cohens* v. *Virginia*, 6 Wheat. 264, 399. Such general expressions should not be extended for any purpose of authority in another or different case. *Safe Deposit & T. Co.* v. *Virginia*, 280 U.S. 83. To be binding as a precedent, there must have been application of the judicial mind to the precise question necessary to be determined in order to fix the rights of the parties. *St. Louis, V. & T. H. R. Co.* v. *Terre Haute & I. R. Co.*, 145 U.S. 393; *United States* v. *Miller*, 208 U.S. 32.

See also *Union Tank Line* v. *Wright*, 249 U.S. 275, 284; *Great Northern Ry. Co.* v. *United States*, 315 U.S. 262, 279; *United States* v. *Dixon*, 347 U.S. 381, 382; *Williams* v. *United States*, 289 U.S. 553, 568; *Baltimore and Carolina Line* v. *Redman*, 295 U.S. 654, 661; *Darr* v. *Burford*, 339 U.S. 200, 214, fn. 38.

It is particularly noteworthy that the United States Court of Appeals for the Seventh Circuit articulated the above rule as stated in *Cohens* v. *Commonwealth of Virginia*, *supra*, in its ruling in *United States* v. *Zuskar*,

7 Cir., 237 F. 2d 328, and meticulously applied it (see 237 F. 2d at 332). Its ruling in this case is in conflict with its own decision in *United States* v. *Zuskar, supra.*

III.

An order to show cause why an alien should not be deported must state facts, which, if true, will support an order of deportation. The order to show cause herein did not state such facts. A motion to terminate the deportation proceedings on that ground was denied. The findings upon which petitioner was found deportable are not included in the charges of the order to show cause. The decision of the United States Court of Appeals affirming the order of deportation on the findings made is in conflict with decisions of the first, sixth and ninth circuits.

The order to show cause, as amended, which constituted the pleading and process of the Government charged substantially as follows:

> "4. You were convicted in the United States District Court at Hammond, Indiana on December 29, 1938, for the offense of conspiracy to violate Internal Revenue Act, Section 88, Title 18, United States Code;" (Exhibit 1).
>
> "6. You were convicted in the United States District Court of South Bend, Indiana on June 10, 1941 for the offense of violation of Internal Revenue Code, Section 88, Title 18, United States Code, 'Internal Revenue Conspiracy';" (Ex. Vol. 95)

The order concluded on the basis of the foregoing that petitioner was subject to be taken into custody and deported under Section 241 (a) (4) (8 U.S.C. 1241 (a) (4)) in that:

> ". . . you at any time after entry have been convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct, to wit, conspiracy to violate Internal Revenue Act, Section 8, Title 18, United States Code, two offenses." (Ex. Vol. 95)

The petitioner forthwith moved the termination of the proceedings on the ground that:

1. The allegations of paragraphs 4 and 5 of the Order to Show Cause herein, and each of them, are confused, contradictory, fail to allege the conviction or convictions of a crime or crimes involving moral turpitude, and are null and void, and,

2. The statement of the provisions under which the said Order to Show Cause purports to subject this respondent to custody and deportation is confused, contradictory, fails to allege the commission of crimes involving moral turpitude, and is null and void. The motion was overruled.. (A. 21-25, Ex. Vol. 99)

Specific objection made to the manner of charging, related to the portion stating "for the offense" which appears to be "violate Internal Revenue Act, Section 88, Title 18 . . ." The statement of the offense is inherently contradictory. Section 88 of Title 18 is, of course, the basic conspiracy section of the code. The offense of violating the internal revenue code is nowhere found in Title 18. Rejecting the code reference as surplusage; "conspiracy . . . to violate Internal Revenue Act" does not describe a crime involving moral turpitude. The order to show cause did not allege sufficient grounds for deportation—similar to an indictment not charging a crime or a complaint failing to state a cause of action; proof beyond the charge cannot support deportation if the charge itself was not sufficient. The classic standard of determination of sufficiency, that is, that the fact allegations of the warrant must justify an order of deportation, if true, fails here.

We cite *Wong Sun Fay* v. *U.S.*, 9 Cir., 13 F. 2d 67 in support of the proposition. There Wong was served with a warrant of arrest that charged that, having come in as

a Chinese merchant, he thereafter changed his occupation to that of a laborer, contrary to the Chinese Exclusion Act. He was found deportable on that basis plus the basis that he had entered the country intending to become a laborer contrary to the Act. The ninth circuit held that if such fraud or misrepresentation was to be relied upon as a ground for his deportation, he was entitled to be advised of it. It wasn't enough that the proof might have showed fraud or misrepresentation.

Here the petitioner was charged with Internal Revenue Conspiracy. Unless the position is taken that a conviction of an internal revenue conspiracy under any and all circumstances is a crime involving moral turpitude, the order to show cause is insufficient in law.

It is no answer to insufficiency that the warrant states the plaintiff was "convicted of two crimes involving moral turpitude." Such statement is, as the 9th Circuit stated in *Takeo Fadano* v. *Manney*, 160 F. 2d 665, 667, merely a conclusion, which may be drawn from any number of factual combinations. We respectfully submit that the warrant of arrest, as amended, is fatally defective and insufficient to sustain these proceedings, and on this basis alone the order of deportation should be vacated and set aside.

There is no better argument for the palpable insufficiency of the warrant, than the fact that the Special Inquiry Officer was obliged to expand and amend his findings beyond the charge in order to find deportability.

The Findings of Fact of the Special Inquiry Officer, (endorsed by the affirmance of the Court of Appeals), upon which he found deportability and ordered deportation, provided in pertinent part:

"3. That the respondent was convicted in the United States District Court at Hammond, Indiana, on December 29, 1938, for the offense of violation of Title 18, U. S. Code, Section 88, (*Conspiracy to violate the Internal Revenue Laws by defrauding the United States of taxes on distilled spirits*;)

"4. That on June 10, 1941, the respondent was convicted in the United States District Court at South Bend, Indiana, for the offense of violation of Title 18, U. S. Code, Section 88 *conspiracy to violate the Internal Revenue Laws by defrauding the United States of taxes on distilled spirits.*" (Decision of August 10, 1959, Emphasis Ours). (A. 128).

The emphases are inserted to demonstrate the extent to which the Special Inquiry Officer, exceeded and amended the charges upon which this petitioner was called on for hearing. This serious, yet facile, deviation from established law is a matter of grave concern to this petitioner and, we submit, to this Court. The alien, whose deportation is sought, has no right more substantive than that his deportation may not be secured upon a ground or grounds not charged in the warrant. Judicial ruling have consistently forbidden the practice employed here.

In *Throumoulapocou* v. *U.S.* 1 Cir., 3 F. 2d 803 the charge was entering the country "without a properly visaed passport," and the alien was ordered deported on the ground that "she presented a passport for the use and in the name of another person." The Third Circuit reversed and remanded with instructions to discharge.

See also *Lo Hop* v. *U. S.*, 6 Cir., 257 F. 489 and *Wong Sun Fay* v. *U. S.*, 9 Cir., 13 F. 2d 67. Both were reversed on the same basis of insufficient charges. In *Takea Fadano*, 9 Cir., 160 F. 2d 665, the 9th Circuit held:

"The alien must be informed of the factual nature of the cause for seeking his deportation, and the order following the hearing *must be based upon the charges made* and must be consistent with the evidence adduced *relevant to them*." *Takeo Fudano* v. *Mannep*, 9 Cir., 160 F. 2d. 665, 667. (Emphasis ours).

This Court's attention is especially directed to footnote 2 of the last-quoted case, which so positively denounces the clear violation of substantive right here demonstrated.

"A reviewing body has no right to consider issues outside the scope of the complaint, and is limited to matters charged therein. *Schneiderman* v. *United States*, 320 U.S. 118, 150, 63 S. Ct. 1333, 87 L. Ed. 1796. This case applies the principle to cases in which personal status is involved as well as in criminal cases, see *Screws* v. *United States*, 325 U.S. 91; 65 S. Ct. 1031; 89 L. Ed. 1495, 162 A.L.R. 1330. . . . Nor may evidence be admitted in support of that which is not alleged or charged in order to determine the status of an individual."

CONCLUSION.

This petition raises serious questions about the propriety of the deportation of a forty year resident of the United States. He was brought on for hearing on an order to show cause why he should not be deported on alleged facts which did not state grounds for deportation. He was ordered deported on fact findings not included in the charges of the order to show cause. The convictions, which formed the basis for his deportation, were not interpreted according to law. He was deprived of an adjudication of the issues he raised relating to the

legality of the deportation order, because of certain remarks of this Court in *Jordan* v. *De George*, 341 U.S. 322, which remarks were found to be controlling on an issue not raised, argued, nor ruled upon by this Court in that case. The order of deportation is contrary to existing law as we know it. We respectfully urge the Court to prevent such summary ouster.

Wherefore your petitioner prays that a writ of certiorari issue directing the United States Court of Appeals for the Seventh Circuit to reverse the judgment in this cause.

Respectfully submitted,

ANNA E. LAVIN,
RICHARD E. GORMAN,
Attorneys for Petitioner.

APPENDIX.

IN THE UNITED STATES DISTRICT COURT

(Caption—No. 60 C 1004)

JUDGMENT ORDER

This cause coming on to be heard on defendant's motion for summary judgment and the Court having had the benefit of arguments of counsel, both orally and on briefs, having weighed the contentions of both parties, having considered the entire record herein as a whole and being fully advised in the premises,

It Is Hereby Ordered, Adjudged And Decreed that the defendant's motion for summary judgment be an the same is hereby granted.

It Is Further Ordered, Adjudged And Decreed that the temporary restraining order, heretofore entered herein, be and the same hereby is vacated.

It Is Further Ordered, Adjudged And Decreed that the plaintiff's petition be and the same is hereby dismissed.

Enter:

/s/ Igoe
Judge.

Date: February 23, 1961

IN THE

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

No. 13407 SEPTEMBER TERM 1961 — JANUARY SESSION 1962

TOM MORGANO,
Plaintiff-Appellant,
v.
ALVA PILLIOD, District Director of Immigration and Naturalization Service, Chicago, Illinois,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

February 5, 1962

Before HASTINGS, *Chief Judge*, DUFFY, and SCHNACKENBERG, *Circuit Judges*.

DUFFY, *Circuit Judge*. This action is based on a complaint for a review of an order of deportation issued against the plaintiff herein. Defendant moved for summary judgment. The District Court granted the motion and from the judgment entered in favor of the defendant, this appeal is taken.

Plaintiff was born in Italy and entered this country in 1922. On June 5, 1959, plaintiff was served with an order to show cause why he should not be deported. The charges in the order were that plaintiff, an alien, was deportable under Sec. 241(a) (4) of the Immigration and Nationality Act in that after entry to this country he was convicted of two crimes involving moral turpitude not arising out of a single scheme of crimial misconduct.

The evidence disclosed that on December 29, 1938, in the United States District Court for the Northern District of Indiana, South Bend Division, plaintiff and three others were convicted of the offense charged in a one-count indictment of conspiracy to violate the Internal Revenue Act. Plaintiff was sentenced to 180 days and served five months of that term in a federal correctional institution.

On January 10, 1941, in the same court, upon pleas of guilty, plaintiff and others were found guilty of violation of United States Code, Title 18, § 88 (now Section 371 of Title 18), "Conspiracy to commit offense or to defraud United States." A sentence of two years was imposed and plaintiff served time in a federal correctional institution.

Fingerprint evidence was received to identify plaintiff as the defendant Morgano who had served time at the federal correctional institution at Milan, Michigan, and also at the United States Penitentiary at Terre Haute, Indiana.

Plaintiff argues that Sec. 1251(a)(4) of Title 8, U. S. Code, upon which the deportation order was based, is unconstitutional in that it offends against the Fifth Amendment. Plaintiff also argues that the section is an *ex post facto* law and therefore violates Article I, Sec. 9, Clause 3 of the Constitution.

The District Director contends that we may not consider the question of constitutionality of the Act because plaintiff did not raise the point or make this contention before the Administrative Agency or in the District Court.

In the ordinary civil suit, jurisdictional questions may be raised at any time even by the reviewing court *sua sponte*. However, the constitutionality of a statute is not necessarily a jurisdictional issue as that term is commonly understood. In 4 C.J.S., Appeal and Error, Sec. 234, it is stated: "It is rule of general application that the constitutionality of a statute cannot be first questioned on appeal . . . Under various circumstances, however, the constitutionality of a statute may be first considered

on appeal . . . [W]here the question of constitutionality involved is one of jurisdiction of the subject matter, since jurisdiction of subject matter cannot be waived or conferred by the parties, the court may consider the question for the first time on appeal. . . ." (footnotes omitted)

Although the constitutionality of a statute may, at times, be a jurisdictional question, such is not generally the case. In the case at bar, no question has been raised that the Immigration and Naturalization Service in any manner lacks jurisdiction over aliens and deportation proceedings. In a somewhat similar situation, *Wong Tai v. United States*, 273 U.S. 77, the Supreme Court did not consider the constitutionality of a statute as a jurisdictional matter which could be raised for the first time on appeal. In that case the defendant, on appeal, attacked the constitutionality of the Act under which he was convicted. The Supreme Court, at pages 78-79 said, "There was no challenge to the constitutionality of the Opium Act in the Distrit Cort. This question was not presented in that court and was neither considered nor determined by it. The objections to the constitutionality of the Act which were set out in the assignment of errors are fully answered in *Yee Hem v. United States*, 268 U.S. 178, decided after this writ of error had been sued out; and the additional objections set forth for the first time in the brief for the defendant in this Court, do not require consideration here."

We would be justified in refusing to consider the question of constitutionality of 8 U.S.C. Sec. 1251(a)(4) because the appellant has raised that question for the first time on appeal. However, the point is not of great importance here because were we to consider the issue on the merits, we would follow the decision of this Court in *United States ex rel. Circella v. Sahli*, 7 Cir., 216 F.2d 33, 40-41, where we rejected arguments similar to those now urged by the appellant.

As to plaintiff's argument based on the claim of *ex post facto* invalidity, we pointed out in *United States ex rel. Circella v. Sahli*, 7 Cir., 216 F.2d 33, page 40: ". . . Since

deportation statutes are not criminal they cannot be *ex post facto*. 'There is no question as to the power of Congress to enact a statute to deport aliens because of past misconduct.'" (Citing Cases)

Plaintiff claims error in that Exhibits 15; 16, 17; 18, 19 and 20 were improperly received in evidence. It is, of course, well settled that the rules of evidence covering judicial proceedings are not applicable to administrative deportation proceedings. The only determination the administrative tribunal needs to consider on the question of admissibility of evidence is whether the evidence is reasonable and of probative value. *United States ex rel. Marcello* v. *Ahrens*, 5 Cir., 212 F.2d 830, affd. sub. nom. *Marcello* v. *Bonds*, 349 U.S. 302; *United States ex rel. Doukas* v. *Wiley*, 7 Cir., 160 F.2d 92; *Bufalino* v. *Holland*, 3 Cir., 277 F.2d 270, 281, cert. denied 364 U.S. 863.

Plaintiff contends that Exhibit 17 was improperly received in evidence. This is a finger print card. Investigator Johnson testified he took the prints and he identified the plaintiff as the person who was "printed." He also stated that finger printing was required by regulations. The Agency regulation which required the alien to be finger-printed is found in 8 CFR 242.4. We find no error in the admission of Exhibit 17. *Holt* v. *United States*, 218 U.S. 245, 252-253; *United States* v. *Kelly*, 2 Cir., 55 F.2d 67.

Exhibit 18 is an alien registration form and finger prints. We upheld the admissibility of a similar exhibit in *United States ex rel. Circella* v. *Sahli*, 7 Cir., 216 F.2d 33, 38. Without discussing in detail the other exhibits named by plaintiff, it suffices to say we have considered plaintiff's arguments with respect thereto but hold there was no error committed in receiving such exhibits into evidence.

Plaintiff also urges that Exhibits 11 and 12 should not have been received. These exhibits pertain to the prior convictions of plaintiff. It is plaintiff's contention that the crimes to which plaintiff pleaded guilty in one case and of which he was found guilty in the other, did not involve

moral turpitude. Plaintiff urges that the reliance which the Government has placed upon *Jordan* v. *DeGeorge*, 341 U.S. 223, is unwarranted.

The plaintiff in the case at bar was named as a co-conspirator in the indictment in the *DeGeorge* case. Referring to that indictment, the Supreme Court stated, 341 U.S. at pages 224-225: "He [DeGeorge] was charged with conspiring to 'unlawfully, knowingly and willfully defraud the United States of tax on distilled spirits.' After being tried and found guilty in 1941, he was sentenced to imprisonment for two years."

We think the *DeGeorge* case is not only pertinent but is controlling. The court there stated, 341 U. S. at page 226: "Respondent has on two separate occasions been convicted of the same crime, conspiracy to defraud the United States of taxes on distilled spirits. Therefore, our inquiry in this case is narrowed to determining whether this particular offense involves moral turpitude." The Court specifically held that it did.

In plaintiff's lengthy brief a number of additional questions are raised. We have carefully considered each one. We find plaintiff's contentions with reference thereto to be without merit. It would unduly extend this opinion to discuss each one of them. We think we have discussed the controlling issues.

We hold that the plaintiff herein was afforded procedural due process. The order of deportation is based upon a record of substantial evidence. The judgment of the District Court is

AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois

Wednesday, March 7, 1962

Before

Hon. John S. Hastings, Chief Judge
Hon. F. Ryan Duffy, Circuit Judge
Hon. Elmer J. Schnackenberg, Circuit Judge

TOM MORGANO, *Plaintiff-Appellant.*

No. 13407 vs.

ALVA PILLIOD, District Director of Immigration, etc., *Defendant-Appellee.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

It Is Ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby, DENIED.